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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

STONEGATE RIVERSIDE, LLC, Plaintiff and Appellant, v. YOUNG J. PAIK et al., Defendants and Respondents.	C059328; C060640 (Super. Ct. No. CV061828)

These consolidated appeals are the third time this court has addressed disputes arising from a purchase agreement in which landowners (defendants Young J. Paik and Sue K. Paik, individually and as trustees for the Young J. Paik Family Trust) agreed to sell land to a buyer on an installment plan, with a continuing relationship in which the Paiks would receive a small percentage of profits from development of the property. In the first appeal (*River Rock Development v. Paik* (Apr. 10, 2007, C051650) [nonpub. opn.]), we upheld a trial court's determination invalidating a purported assignment of the sales agreement by the buyer -- Stonegate Riverside, LLC, through its owner Alfred F. Smith (Stonegate) -- to a third party (River

Rock Development). A second appeal in this court (*River Rock v. Paik* (Jan. 7, 2010, C057850 [nonpub. opn.]) dealt with River Rock's members' alter ego liability for attorney fees. The first and second appeals arose in litigation filed by the purported assignee, River Rock, against the Paiks. Now, in appeal C059328, the original buyer -- Stonegate[1] -- seeks to proceed with the sales agreement, but the Paiks claim Stonegate has no remaining rights in the sales agreement after the ineffective attempted assignment. We shall conclude the trial court erred in granting summary judgment to the Paiks.[2] In the consolidated appeal (C060640), we shall reverse the trial court's award of attorney fees.

STANDARD OF REVIEW

Summary judgment shall be granted if all the submitted papers show there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code

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[1] Stonegate's sole member, Alfred Smith, assigned his rights in Stonegate to K-RIF, LLC, an Arizona limited liability company, which assigned its interest to K-RIF, LLC, a California limited liability company. The complaint at issue in this appeal was filed by Stonegate Riverside, LLC, "by its assignee and sole member, K-RIF, LLC, a California limited liability company." Both sides to this appeal refer to the plaintiff as Stonegate, and we have no need in this appeal to resolve any issue about the assignments to the K-RIFs.

[2] The complaint named as defendants not only Young and Sue Paik, individually and as trustees of the Young J. Paik Family Trust, but also the Paiks' adult children, Marilyn, Nelson, and David, who allegedly own an interest in one of the 361 acres at issue. For purposes of this appeal, our reference to "the Paiks" includes all named defendants.

Civ. Proc., § 437c, subd. (c).) A defendant meets its burden of showing that cause of action has no merit if it shows that one or more elements of the cause of action cannot be established, or that there is a complete defense. (§ 437c, subd. (p)(2).) If the defendant meets that burden, the burden shifts to the plaintiff to show triable issues of material fact exist. (*Ibid*.) On appeal, we review the trial court's decision de novo. (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142.) We identify the issues raised by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition demonstrates the existence of triable factual issues. (*Silva v. Lucky Stores, Inc*. (1998) 65 Cal.App.4th 256, 261.)

THE PLEADINGS

This appeal involves Stonegate's complaint against the Paiks, seeking to enforce the purchase agreement.

To provide background, we observe this complaint was filed after the trial court (in the lawsuit filed by the River Rock against the Paiks) invalidated Stonegate's purported assignment of its rights under the purchase agreement to River Rock, and before we filed our opinion upholding the trial court's decision. The purported assignment was held invalid due to the absence of *written* consent of the Paiks, as expressly required by the purchase agreement. As explained in our previous opinion (*River Rock Development v. Paik, supra,* C051650), the Paiks (1) expressed *verbal* consent to an *initial* assignment agreement, (2)

were never informed of an amendment to the assignment deleting a funding requirement protective of their interests, and (3) never gave *written* consent.[3]

The operative pleading in this appeal, Stonegate's first amended complaint filed on December 15, 2006, asserted four counts: (1) specific performance; (2) breach of express contract; (3) breach of the implied covenant of good faith and fair dealing; and (4) provisional reformation of contract (to include the Paik children as defendants). The complaint alleged Stonegate made payments to the Paiks under the purchase agreement totaling $560,000, and proffered further payments in performance of the contract through its "agent and joint venturer" River Rock, but the Paiks refused to accept further payment and instead declared a default. The complaint alleged the Paiks anticipatorily breached the contract by inaccurately declaring a default by Stonegate and failing to acknowledge cure of any alleged default. Stonegate asked for specific

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[3] The tone of Stonegate's appellate brief betrays Stonegate's abiding vexation at what it perceives as unfair play by the Paiks in (1) failing to remind Stonegate that written consent was required for assignment, and (2) failing to assert this defense until late in the litigation (which we suspect reflects lack of attention to detail by the Paiks' attorney). Stonegate's sense of victimization is misplaced. It was within Stonegate's power and duty to avoid this problem simply by reading the purchase agreement it signed. Had it done so, it would have seen that the contract clearly required written consent for assignment. River Rock also had the power and duty to read the purchase agreement that was the subject of its assignment agreement.

performance of the purchase agreement or, alternatively, breach of contract damages; equitable estoppel of affirmative defenses due to the Paiks' inequitable conduct (with no specific allegation that the refusal to consent to assignment was inequitable); revision of the contract to include the Paik children; and attorney fees.

The Paiks filed an answer denying everything and asserting dozens of affirmative defenses, including, "Failure to do Equity" in that Stonegate attempted to assign its rights without the Paiks' consent.

THE SUMMARY JUDGMENT MOTION

After we issued our opinion invalidating the assignment in the lawsuit filed by River Rock, the Paiks moved for summary judgment in this lawsuit filed by Stonegate on the grounds (1) collateral estoppel precludes Stonegate from relitigating issues decided adversely to River Rock in prior proceedings; (2) res judicata precludes relitigation which would "split" a cause of action by allowing two assignees of Stonegate -- K-RIF and River Rock -- to pursue separate lawsuits against the Paiks; (3) K-RIF lacks standing because Stonegate assigned its right in the Paik contract to River Rock; (4) Stonegate materially breached the purchase agreement by assigning its rights without the Paiks' written consent; and (5) Stonegate has no contract with the Paik children.

The Paiks submitted a separate statement of undisputed facts with 48 separate factual assertions, mainly recounting the

procedural background of the disputes, including our opinion in the River Rock case, and an unsuccessful attempt by River Rock to add Stonegate as a party plaintiff in River Rock's lawsuit against the Paiks, after the trial court's tentative ruling invalidating the assignment. Of key significance to our disposition of this appeal is the Paik's assertion that Stonegate "materially breached" the purchase agreement by assigning its rights to River Rock without obtaining the Paiks' written consent. As we explain, *post*, the Paiks appear to assume their allegation of breach necessarily means that Stonegate forfeited all of its rights in the purchase agreement by the invalid assignment -- a position unsupported by any fact or law presented by the Paiks.

THE OPPOSITION

Stonegate opposed summary judgment, asserting the assignment never became effective, and the Paiks' assertion that the attempted assignment "materially breached" the purchase agreement was not a statement of fact, but a conclusion of law insufficient for summary judgment. Stonegate argued the Paik children are proper parties as beneficiaries of named defendant, the Young J. Paik Family Trust, and record owners of a portion of the real property which is the subject of the litigation.

THE RULING

The trial court granted summary judgment, stating in its written ruling that in the suit filed by purported assignee River Rock against the Paiks, the court held River Rock did not

have a valid contract with the Paiks because the Paiks had not given written consent to the assignment, but in that case the court did not consider whether the assignment was valid as between Stonegate and River Rock. That issue has now been raised, said the trial court, which found that, although the Paiks did not approve the assignment of Stonegate's rights under the Purchase Agreement, as between Stonegate (the assignor) and River Rock (the assignee), the assignment was effective to pass Stonegate's contract rights to River Rock. By proceeding with closing the assignment agreement despite the absence of the Paiks' *written* consent, the assignor and assignee waived all conditions for closing the assignment. There was no evidence that the assignor and assignee ever rescinded, cancelled, or otherwise terminated the assignment. The trial court concluded, "Because Stonegate had assigned all of its rights, title and interest in the Purchase Agreement to River Rock and the assignment was not rescinded, cancelled or otherwise terminated, Stonegate cannot enforce the Purchase Agreement against the Paiks."

The trial court did not address other issues raised in the summary judgment motion.

Stonegate appeals from the ensuing judgment.

ATTORNEY FEES

The trial court granted the Paiks' motion for contractual attorney fees under Civil Code section 1717 and awarded them $151,707.50. Stonegate appeals. At Stonegate's request, we

consolidated the appeals from the summary judgment and the attorney fees order.

DISCUSSION

I. Summary Judgment

Stonegate contends the trial court erred in granting summary judgment. On appeal, as in the trial court, the parties expend energy arguing about things that do not matter in this summary judgment proceeding, e.g., whether the assignment was void ab initio, whether the Paiks' written consent was a condition precedent to assignment, whether Stonegate and River Rock waived the condition, and whether there was impossibility or mutual mistake. We shall conclude the Paiks failed to meet their burden, as the parties moving for summary judgment, to cite any fact or law supporting their apparent assumption that Stonegate forfeited its rights to the purchase agreement by making an invalid attempted assignment.

A. Forfeiture

The trial court, in concluding the assignment was effective to strip Stonegate of any rights under the purchase agreement as against the Paiks, relied upon the Paiks' cited authority, *Johnston v. Landucci* (1942) 21 Cal.2d 63 (*Johnston*). However, that case has nothing to do with this case. *Johnston* expressly limited itself to a determination of rights as between an assignor and assignee, in litigation where the seller was not objecting to the assignment and the seller's rights were not at issue.

In that case, the plaintiffs/Johnstons appealed from a judgment quieting title to land in Fresno County, subject to a lien of one Landucci, which lien was ordered foreclosed by the judgment. (*Johnston, supra,* 21 Cal.2nd 63, 64.) The second sentence of the Supreme Court's opinion states, "The sole question presented on this appeal is whether the lien ordered foreclosed is based upon a valid contract, it being the contention of the [Johnstons] that such contract was totally unsupported by consideration." (*Ibid.*) The facts were that the Johnstons bought the Fresno land from Miller & Lux on an installment plan. Later, one of the Johnstons (Arthur) wanted to buy land in Merced County from Miller & Lux on an installment contract, but Miller & Lux was unwilling to enter into a transaction with him because of lack of financial backing. (*Id.* at p. 65.) Landucci bought the land at Arthur's request and, on the same day, subcontracted to sell the land to Arthur on an installment plan. Arthur became unable to keep up the payments and, desirous of salvaging some of his equity, wanted to trade his interest for a hotel building owned by one Imperatrice. To facilitate the trade, Arthur got Landucci to replace the subcontract with an assignment of Landucci's contract with Miller & Lux regarding the Merced land, in exchange for which Arthur gave Landucci a promissory note secured by the Fresno land. Arthur never paid the promissory note. (*Ibid.*) After the Johnstons paid off the Fresno land and Arthur gave his interest in the Fresno land to his mother, the Johnstons sought

to quiet title to the property, but Landucci claimed an equitable mortgage based on the promissory note and assignment executed by Arthur. The trial court determined the assignment created a valid lien as security and ordered the lien foreclosed. (*Id.* at p. 66.)

On appeal, the Johnstons argued the promissory note and assignment were unsupported by consideration and invalid, because Miller & Lux had never approved the assignment, as required by its contract (which said neither the contract nor any interest therein was assignable without the written consent of the seller). The Johnstons argued the printed assignment expressly stated the assignment was subject to Miller & Lux's approval, and therefore Arthur received no consideration. (*Johnston, supra,* 21 Cal.2d 63, 66.) The Supreme Court said, "The question presented is whether, as between Arthur Johnston and A. E. Landucci, the latter's assignment of the Miller & Lux contract for the purchase of the Merced lands passed the interest of Landucci in such lands. If it did, the note and assignment by Arthur are amply supported by consideration and the judgment appealed from should be affirmed. If it did not, the deal between Landucci and Arthur was never consummated, Arthur never received the consideration bargained for, his note and assignment are unsupported by consideration, and the judgment should be reversed." (*Id.* at p. 67.) The Supreme Court further broke it down to two questions: "(1) Does a provision prohibiting assignment without consent of the seller

. . . prevent the interest of the buyer-assignor passing to an assignee, where such consent is not secured? (2) If an assignment without consent does pass the interest of the assignor to the assignee, where the assignment itself provides it is 'subject to the approval' of the seller, is such assignment effective *as between the assignor and assignee* to pass the assignor's interest although no consent is ever secured?" (*Ibid.*, italics added.) The Supreme Court found no California cases on point but "the overwhelming weight of authority in other jurisdictions is to the effect that provisions against assignment . . . *are for the benefit of the vendor only*, and in no way affect the validity of an assignment without consent *as between the assignor and assignee*. In other words, the interest of the assignor in the contract passes to the assignee, *subject to the rights of the original seller*. This is the rule set forth in the Restatement of the Law of Contracts. Section 176 reads as follows: 'A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights *against the assignor* by the assignment or the obligor from discharging his duty under the contract in any way permissible if there were no such prohibition.'[4] [¶] The rule

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4 Though not mentioned by the parties, this language now appears in Restatement Second of Contracts, section 322, paragraph (2)(c). We observe Restatement Second of Contracts, section 322, paragraph (2)(b), says a contractual prohibition against assignment gives the obligor a right to damages for breach but

that such provisions are for the benefit of the seller and in no way affect the validity of an assignment *as between the assignor and assignee* is the rule adopted by the United States Supreme Court (*Portuguese-American Bank v. Welles*, 242 U.S. 7 [61 L.Ed. 116]) and is the rule approved by Williston in his work on Contracts (Williston on Contracts, Revised ed., vol. II, § 422)." (*Johnston, supra*, 21 Cal.2d at p. 68, italics added.) Thus, "the assignment from Landucci to Arthur Johnston passed to the latter the interest of the former, subject to the rights of Miller & Lux." (*Ibid*.)

The Supreme Court rejected the contention that the words in the assignment contract (that the assignment was subject to Miller & Lux's consent) created a condition precedent to validity of the assignment. (*Johnston, supra,* 21 Cal.2d 63, 69.) Rather, the words "call[ed] the assignee's attention to the fact that the assignment may be defeated by the vendor refusing its consent. [Citations]." (*Ibid*.)

Thus, the *Johnston* case has no bearing whatsoever on this case, where the sellers (the Paiks) defeated the assignment by asserting their rights under the consent clause. Like *Johnston*, the United States Supreme Court case cited in *Johnston* involved

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does not render the assignment ineffective. No one has raised this point in this court, no California case adopts this provision, and we need not consider it (though it seemingly would not apply where, as here, the contract calls for a continuing relationship between buyer and seller). In any event, our opinion in the first appeal, invalidating the assignment, is final.

a dispute between assignor and assignee, where the obligor made no objection to the assignment. (*Portuguese-American Bank, supra*, 242 U.S. at p. 11.)

Though not acknowledged by the Paiks, their position in effect assumes that Stonegate forfeited its rights under the purchase agreement by making an invalid attempt to assign its rights. However, the Paiks offer no legal or factual analysis or authority supporting their assumption.

We observe a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. (Civ. Code, § 1442.) Forfeitures are disfavored and will be enforced only when the party claiming the forfeiture shows that such was the unmistakable intention of the instrument. (*Ser-Bye Corp. v. C.P.& G. Markets* (1947) 78 Cal.App.2d 915, 919.) The Paiks do not point to any contract clause calling for forfeiture of the entire purchase agreement in the event of an unsuccessful assignment, and it is not our job to scour the contract looking for such a provision.

Stonegate's complaint alleged it "has performed all duties and obligations required of it that it agreed to perform in the Agreement, except for those duties excused by the actions and conduct of the Paiks and their agents." The complaint alleged, "Prior to the Paiks' repudiation and anticipatory breach of the Agreement . . . , [Stonegate] performed all duties, promises, and obligations required of the buyer under the Agreement, as amended, and in accordance with the parties' course of conduct

evidencing [*sic*] their mutual understanding and interpretation of the requirements of the Agreement . . . ."

The Paiks' separate statement of undisputed facts supporting summary judgment contained no factual assertion or supporting evidence of a forfeiture. Rather, the Paiks simply asserted Stonegate "materially breached the contract when it closed the [assignment] with River Rock, and thereafter gave control of performance of the Paik contract to River Rock."

It was the Paiks' burden, as the parties moving for summary judgment, to present fact and/or law entitling them to summary judgment. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850-851, 861.) When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true, or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff does not possess and cannot reasonably obtain, needed evidence. (*Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1003.) If a defendant moving for summary judgment fails to meet its burden as the moving party, the plaintiff has no burden, and summary judgment must be denied. (*Waschek v. Dept. of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

We conclude the Paiks failed to meet their burden as the parties moving for summary judgment, and the judgment must be reversed.

B. Splitting Cause of Action

The Paiks ask us to affirm the judgment on a ground raised in the summary judgment motion but unaddressed by the trial court's ruling -- that "K-RIF's" lawsuit (as assignee of Stonegate's sole member) impermissibly attempts to split a cause of action. Stonegate notes this contention was the subject of a demurrer, overruled by the trial court, with writ review summarily denied by this court in *River Rock Development, supra,* (C056594) on September 20, 2007. The Paiks fail to persuade us that the summary judgment should be affirmed on this ground, and we therefore need not address Stonegate's assertion in its reply brief that this court cannot affirm on a different ground than the trial court without allowing supplemental briefing.

The Paiks argue, "in the River Rock Action, River Rock, as assignee of Stonegate, pressed contractual claims against the Paiks arising from the [purchase agreement]. [Citation to record.] The identical claims are being asserted by KRIF in this action by way of a subsequent assignment." However, contrary to the Paiks' insinuation, this case does not involve an attempt by Stonegate to assign the purchase agreement to a second assignee after the court invalidated assignment of the purchase agreement to a first assignee. The River Rock action involved a purported assignment *of the purchase agreement* from

Stonegate to River Rock. In the instant case, according to the complaint's allegations, Stonegate's sole member (Alfred Smith) assigned his interest *in Stonegate* to K-RIF. The Paiks cite no authority precluding Stonegate's member from assigning his interest in Stonegate.

The Paiks invoke the primary right theory that, "a party may not split up a single cause of action and make it the basis of separate suits, and in such case the first action may be pleaded in abatement of any subsequent suit on the same claim." (*Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 894.) *Wulfjen* held that, after an unsuccessful suit against individual defendants on an alter ego theory, the same plaintiff could not sue the same individuals for conspiracy. However, the second suit could proceed against a defendant who was not named as a party in the first action. (*Id.* at p. 897.)

Here, no single party filed separate suits. The first action was brought by River Rock on its own behalf as assignee of the purchase agreement. This action is brought by Stonegate (through its sole member).

The Paiks cite two cases for the proposition that whether a breach of contract action is asserted by an assignor or an assignee, there is but one cause of action flowing from a single breach of contract, which must be asserted in a single action. Neither of the cited cases supports the Paiks. *Mycogen Corp. v. Monsanto* (2002) 28 Cal.4th 888, held that a plaintiff who obtained a judgment for specific performance of a contract in a

prior lawsuit could not sue for breach of contract damages in a second lawsuit. (*Id.* at pp. 896-898.) Although a declaratory judgment will not preclude a subsequent suit, the judgment in the first case was not merely a declaratory judgment. (*Ibid.*)

The other case cited by the Paiks -- *Abbott v. The 76 Land and Water Co.* (1911) 161 Cal. 42 -- held that a prior judgment in favor of a buyer in an action for specific performance of a contract for the sale of land and appurtenant water rights barred a subsequent lawsuit by the buyer's assignor against the seller for breach of contract damages. Thus, in *Abbott*, there was in the first lawsuit an adjudication of the cause of action flowing from the breach of contract. Here, there has never been an adjudication of a cause of action flowing from the Paiks' alleged breach of the contract. The first action, by River Rock, was shut down due to lack of standing, in that the purported assignment to River Rock was invalid.

We see no basis for affirming the judgment based on the rule against splitting causes of action. That the present complaint alleges River Rock was an "agent and joint venturer" of Stonegate does not establish as a matter of law that judgment should be entered in favor of the Paiks.

Moreover, the Paiks assert in their separate statement of undisputed facts (undisputed by Stonegate) that, in the River Rock lawsuit, attorneys representing both River Rock and Stonegate attempted to add Stonegate as a party after the trial court's tentative ruling invalidating the assignment, but they

did not succeed in doing so. Under these circumstances, it would be inequitable to foreclose Stonegate from pursuing this suit.

We conclude the judgment may not be affirmed on the ground of splitting a cause of action.

C. The Paik Children

The Paiks also ask us to affirm the judgment on another ground raised in the motion but unaddressed by the ruling -- that the Paik children cannot be added as named defendants. However, this cannot be a ground for affirming the entire judgment. Nor will we address it as a matter of summary adjudication, because the Paiks' motion did not seek summary adjudication of this issue. Rather, they sought summary adjudication (as an alternative to summary judgment) only with respect to the specific performance cause of action, unrelated to any issue about the children. "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (Cal. Rules of Court, rule 3.1350(b).) If a party desires summary adjudication of particular issues, that party must make its intentions clear in the motion. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 744.) There is a sound reason for this rule: the opposing party may have decided to raise only one

triable issue in order to defeat the motion, without intending to concede the other issues. It would be unfair to grant summary adjudication unless the opposing party was on notice that an issue-by-issue adjudication might be ordered if summary judgment was denied. (*Ibid.*, citing *Gonzales v. Superior Court* (1987) 189 Cal.App.3d 1542, 1546.)

Here, although the separate statement of undisputed facts asserted the children were not signatories to the purchase agreement, the notice of motion did not state the matter of the children as a basis for summary adjudication. The notice of motion merely stated, "In the alternative, the PAIKS move for summary adjudication with respect to Plaintiff's First Cause of Action for specific performance, on the grounds that Plaintiff cannot establish that Plaintiff, or its predecessors, were ready, willing and able to perform at all times, on essential elements to Plaintiff's claim for specific performance."

We reject the Paiks' request that we grant summary adjudication regarding the children.

We conclude the summary judgment must be reversed.

II. Attorney Fees

Since we reverse the judgment, the Paiks have not prevailed and are not entitled to attorney fees. We shall therefore reverse the attorney fee award.

DISPOSITION

The judgment is reversed. The order awarding attorney fees is reversed. Stonegate shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

SIMS, Acting P. J.

We concur:

RAYE, J.

HULL, J.